

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-2167

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

THERESE ROBERGE

On Behalf of Herself, Her Minor Children
and All Persons Similarly Situated
Appellants

v.

PAUL R. PHILBROOK

Commissioner of the Vermont
Department of Social Welfare
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT
Civil Action No. 6301

BRIEF OF APPELLEE

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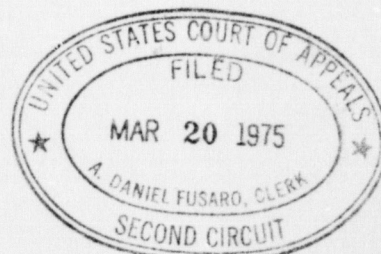


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I. STATEMENT OF THE ISSUES¹

- A. Whether defendant's regulations which provided different shelter maxima for Chittenden County than the rest of the State in its Aid to Needy Families with Children program violated the Social Security Act.
- B. Whether defendant's elimination of shelter exceptions violated §402(a)(23) of the Social Security Act.
- C. Whether defendant's elimination of the Fire Insurance Special Need item was a violation of §402(a)(23) of the Social Security Act.

II. STATEMENT OF THE CASE²

A. Nature of the Case

Plaintiff brought the lawsuit below challenging Vermont's policies and regulation pertaining to the

¹The first two issues set forth in appellee's statement of the issues are arranged in reverse order from the manner set forth in appellants' brief. And, in addition, the third issue is the one raised on defendant's cross-appeal.

²Because of the complex nature of the issues involved, appellee has set forth his own interpretation of the Statement of the Case.

shelter segment of its Aid to Needy Families with Children program. The parties stipulated that all constitutional questions would be withheld and the pendent statutory claims heard by a single judge. From the opinions of the two judges below, both parties appealed.

B. Course of the Proceedings

The action below was commenced on June 9, 1971 by plaintiff's³ challenging certain policies and regulations of the Vermont Department of Social Welfare pertaining to the shelter segment of its Aid to Needy Families with Children program. The complaint, seeking declaratory and injunctive relief, maintained that defendant's eliminating the shelter exceptions policy, its regulations pertaining to shelter grant area differential, and the elimination of the fire insurance special need item from the basic needs violated §402(a)(23) of the Social Security Act, 42 U.S.C. §602(a)(23). Since plaintiff sought to have a regulation of state-wide applicability declared unconstitutional, a three-judge district court, pursuant to 28 U.S.C. §2281 was requested. Plaintiff alleged jurisdiction under 28 U.S.C. §1343.

³The action was brought and maintained as a Class Action by plaintiff on behalf of herself, her minor children, and all persons similarly situated.

Both parties moved for Summary Judgment, which motions were heard by Circuit Judge James L. Oakes, sitting by designation, on April 24, 1972. By opinion and order, dated October 14, 1972, Judge Oakes denied plaintiff's motion for summary judgment and granted defendant's motion with respect to the question of area differential in the shelter segment of the Aid to Needy Families with Children program.

With respect to the issues involving the eliminating of the shelter exception and the fire insurance special needs, a hearing was held on September 9, 1973 before District Judge Albert W. Coffrin. On May 9, 1974, Judge Coffrin issued an opinion finding that the deletion of the shelter exception policy in November, 1970 was not a significant part of the defendant's Aid to Needy Families with Children program, and hence there was no violation of §402(a)(23). He also found that with respect to the deletion of the fire insurance special need item, the defendant had violated §402(a)(23) of the Social Security Act.

On July 19, 1974, the Court entered its Order of Judgment.

On August 19, 1974, plaintiff filed a Notice of Appeal from both lower court orders. On August 26, 1974, defendant filed a notice of cross-appeal from the order of July 19, 1974.

C. Disposition of the Court Below

The opinion and order of Judge Oakes granting defendant's motion of summary judgment is not reported but can be found in the Appendix, at A-39.

The opinion and order of Judge Coffrin holding that the elimination of shelter exceptions did not violate §402(a)(23), but the elimination of the fire insurance special needs did, is not reported, but can be found in the Appendix at A-60, and A-75, respectively.

D. Statement of Facts

Plaintiff at all times material to this action has been a recipient of public assistance from the State of Vermont through its Aid to Needy Families with Children (ANFC) program. During the first ten months of 1970, plaintiff received as part of her ANFC grant \$125 per month for shelter. Plaintiff received the maximum of \$104 plus \$21 as a shelter exception.⁴ In addition, prior to November 1, 1970, plaintiff received \$4 per month in her grant to pay for fire insurance premiums.

On November 1, 1970, the Defendant Vermont Department of Social Welfare eliminated the policy of making shelter grant exceptions. It also eliminated from its

⁴ A shelter exception payment is a payment made to an ANFC recipient in excess of the maximum allowable shelter grant.

regulations the fire insurance special needs. On that same date, the payment standard was raised from 89.5% to 100%.

Because of the elimination of the shelter exceptions and the fire insurance special need, plaintiff's shelter grant as of November 1, 1970 was reduced to the then applicable maximum of \$104. In addition, any payments for fire insurance premiums were incorporated in her shelter payment, which now at the maximum⁵, made her ineligible for a separate payment.

On December 1, 1967, defendant established maxima on payment of shelter costs, which were:

	Chittenden County	Rest of State
Unfurnished, no fuel/utilities supplied	\$100 per mo.	\$85 per mo.
Furnished or fuel/utilities supplied	120 per mo.	120 per mo.

These maxima were updated as a result of the §402 (a)(23) mandate on May 1, 1970 to the following:

	Chittenden County	Rest of State
Unfurnished, no fuel/utilities supplied	\$102	\$88
Furnished or fuel/utilities supplied	124	124

The maxima set forth above were based upon three surveys taken by the defendant.

⁵If plaintiff's shelter grant had been below the maximum, then under the new regulation (effective November 1, 1970) she would have been eligible for fire insurance, so long as the total shelter grant (including fire insurance premiums) was not above the maximum.

The April, 1969 survey revealed the following statistics:

	Chittenden County	Rest of State
Average Rent	\$84	\$50
Median Rent	87	55

See Appendix of Exhibits at A-24

The survey dated December 3, 1970 revealed the following statistics:

	Chittenden County		Rest of State	
	5/70	11/70	5/70	11/70
Average Rent	\$81	\$89	\$60	\$63
Median Rent	89	100	60	67

See Appendix of Exhibits at A-27

The last survey dated October 20, 1971 revealed the following statistics:

	Chittenden County	Rest of State
Average Rent	\$92	\$66
Median Rent	100	75

See Appendix of Exhibits at A-22

In the overall ANFC program, there were the following expenditures in 1970:

	Chittenden County	Entire State	Per Recipient
Total Amount spent in the ANFC program	\$2,100,000	\$8,200,000	\$621
Total Shelter Allow- ances spent in ANFC program	868,000	2,800,000	17.99
Total Shelter Exceptions spent in the ANFC program	25,700	45,000	.28

See Appendix of Exhibits at A-37.

Of the total number of families statewide receiving shelter grants in October, 1970, 5% or 159 were receiving shelter exceptions. (This figure was 8% in Chittenden County).

Defendant, raising the payment standards from 89.5% to 100% as of November 1, 1970, increased the State's monthly ANFC cost by \$80,003 or \$5.90 per recipient. In addition, the May, 1970 shelter update increased the defendant's monthly costs by \$2650 or 20 cents per recipient. This was a total of \$82,653 or \$6.10 per recipient.

At the same time, as part of the overall streamlining of the program, there were savings to the State amounting to \$3754 per month from the elimination of shelter exceptions, and \$18,486 from the elimination of certain special needs for a total of \$22,240. Thus, the total

fiscal impact on the State amounted to a new monthly expenditure of \$60,413 or \$4.42 per recipient.

In October, 1970, 388 ANFC cases received an allotment for fire insurance. The total expended by defendant over the entire ANFC caseload was 57 cents per case, or 16 cents per recipient.

When the defendant averaged all special needs as of November 1, 1970, the basic needs standard was calculated to be \$2.18 per recipient. In the rounding off process, each recipient increase was set at \$2.00.

III. ARGUMENT

- A. Defendant's payment of shelter grants based upon geographical area does not violate 45 C.F.R. 233.20 (a)(2)(iii) or Boddie v. Wyman⁶.

Appellee Vermont (defendant below) has, for purpose of providing shelter grants in its ANFC program, divided the State into two geographical components, namely Chittenden County and the rest of the State.

In the action below, both parties moved for Summary Judgment involving plaintiff's challenge to defendant's

⁶434 F. 2d 1207 2nd Cir. (1970), aff'd 402 U.S. 991 (1971)

practice of granting shelter based on geographic location. Plaintiff, after acknowledging that cost studies had been done pointed out that the actual differences in shelter costs between Chittenden County and the rest of the State far exceeded the intrastate differences between rental maxima, and this is where her argument rests. See Opinion, Oakes, J., Appendix at A-44.

In denying plaintiff's motion for summary judgment, and in granting defendant's motion for summary judgment on the rent differential question, Judge Oakes did not adopt plaintiff's argument that the actual rent differential must be fully reflected in Vermont's need standard. Instead, he concluded that so long as Vermont's differential was not arbitrary, but was in fact based on actual cost studies, there were no violations of the Social Security Act.

Initially, Appellant Roberge sets forth the purpose of the Act, which is to set up a uniform payment standard. She correctly points out "The Legislative history of the act clearly shows that the purpose of these requirements (to have a uniform state payment standard) was to eliminate the variations in standards that existed in counties or municipalities prior to the adoption of the Social Security Act." Plaintiff's - Appellant's brief, at 27. See Boddie v. Wyman, supra.

We further acknowledge that appellant is correct in pointing out that 45 C.F.R. 233.20(a)(2)(iii) limits the State's ability in varying a uniform standard. The lower court recognized that any variance is clearly limited and "must be justified by facts." Opinion, Oakes, J., Appendix at A-45.

Also, this criterion is strengthened by a careful examination of Boddie, which says that a state "can not receive federal funds if it continues its system of intra-state differential, unless it can justify such differential by a showing that they are based on actual differences in cost" (emphasis supplied) at 1211.

However, we do not concur with appellant that the actual differential in rent between Chittenden County and the rest of the State must be fully reflected in Vermont's need standard. We read Boddie to say that any differential must be supported by the facts of the particular case, without the necessity for the differential being the actual difference in cost.

As part of Vermont's motion for summary judgment, reliance was placed upon prior documentation, that in fact surveys involving rent were taken which reflected information used in computing the shelter maxima. For example, an affidavit submitted by Edward Pirie, the Chief Statistician for the Vermont Department of Social Welfare, attested to

the reliance by defendant on certain rental information gathered in a 1967 survey. See Appendix at A-32. In addition, while performing the desk review⁷ of September 1, 1971, the following information was obtained:

	Chittenden County	Rest of State
Average Rent	\$92	\$66
Median Rent	100	75
Department Maximum	104	80

See Appendix of Exhibits at A-22⁸

The issue is not whether the State of Vermont can establish two different shelter maxima within its borders, but whether it has complied with principles set forth in Boddie in basing these maxima on cost studies. Vermont submits it has done exactly that. The lower court points out quite correctly that the facts in Boddie are distinguishable from the instant case, namely that the plaintiffs in Boddie were receiving a smaller rental payment than other

⁷ A desk review is comprised of each social worker reviewing each client's file in order to gather the appropriate information.

⁸ For prior Department surveys, see Appendix of Exhibits at A-24 and A-27. At all times the Department's maxima for both geographical areas were in excess of the average and median rents paid according to these surveys.

recipients, where in the instant case, plaintiffs were receiving the highest maxima available - that is, the maximum paid in Chittenden County⁹, together with a rental exception. In addition, and more important, the New York survey¹⁰ had confirmed that there was "no objectively verifiable difference in cost." See Boddie, supra, at 1211. To the contrary, in Vermont, there were many surveys¹¹ to indicate an actual difference in cost, which Vermont acknowledged and implemented.

Defendant interpreted Boddie to say that any cost differential must be justified, but that there is no command to pay the full differential; nor in fact is the State required to pay any of the differential. Appellant has conceded this latter point, and has adopted the position

⁹ Parenthetically, how can Chittenden County residents, who are receiving both more than the rest-of-state maximum and more than the maximum that would have resulted from establishing a single state-wide maximum, based on the average actual costs for the entire State, argue that they are being treated inequitably.

¹⁰ The surveys taken in New York principally pertain to the flat grant awards which did not include shelter. Shelter was paid apart from the flat grant. This in many ways is similar to Vermont's system except for the one important fact that the Vermont surveys specifically showed that a differential existed between Chittenden County and the rest of the State.

¹¹ See p. 6, supra.

that it is an all or nothing proposition¹². See Plaintiff's Memorandum of Law of April 27, 1972 at 6. But Boddie merely says HEW prefers no differential, but if you must, make sure it is not arbitrary, and justify it.

The lower court concluded that, based on the evidence submitted from both parties, the "Vermont differential appears neither irrational nor arbitrary." Opinion, Oakes, J., Appendix, at A-47.

This proposition can be supported by looking to the Supreme Court's decision in Jefferson v. Hackney, 406 U. S. 535 (1972), which involved a percentage reduction system in effect in the State of Texas. The Court upheld Texas' system which funded its AFDC program at only 75% of the standard of need, while its other Social Security Act programs were funded at 95% and 100%. Mr. Justice Rehnquist stated at 549-550:

Similarly, we cannot accept the argument in Mr. Justice Marshall's dissent that the Social Security Act itself requires equal percentages for each categorical assistance program. The dissent concedes that a State might simply refuse to participate in the AFDC program, while continuing to receive federal money for the other categorical program ... Nevertheless, it is argued that Congress intended to prohibit any middle ground --once the State does participate in a program it

¹²Simply put, appellant says that you are not required to have an area differential, and in fact, HEW would prefer you not to have one, but if you do have one, then it must be based on the actual cost differential.

must do so on the same basis as it participates in every other program. Such an all-or-nothing policy judgment may well be defensible, and the dissenters may be correct that nothing in the statute expressly rejects it. But neither does anything in the statute approve or require it. (footnote omitted - emphasis added)

States traditionally have been given discretion to pay as little or as much in benefits as they choose. Historically, there have been significant differences in the level of benefits paid in different states. Rosado v. Wyman, 397 U.S. 397, 408 (1970). Vermont in determining the benefits it will pay to an ANFC family first determines the items that comprise the "standard of need;" that is, items that are necessary for subsistence. Secondly, the State determines the level of benefit at which it actually makes grants. With respect to these two decisions, Congress has allowed the states considerable discretion in making the determinations involved in the various state programs. King v. Smith, 392 U.S. 309 (1968); Rosado v. Wyman, supra, Alvarado v. Schmidt, 317 F. Supp. 1027, 1032 (W.D. Wis. 1970)

In addition, as found by the lower court, it has been traditionally left up to the states to determine which recipient group is in the most need. See Opinion, Oakes, J., Appendix at A-47. In the case at bar, Vermont has done exactly that, to the benefit of plaintiffs. In setting a higher maximum for Chittenden County than the rest of the State, Vermont is saying that residents of Chittenden County

need more in the way of shelter grants than they would receive under a single statewide maximum grant system.

Appellant insists, contrary to the lower court's finding, that "both Boddie and HEW regulation require that intrastate differentials be based on actual differences in cost." Appellant's brief, at 29. However, this position becomes meaningless, and in fact financially hurts appellants, if Vermont, on finding that such fully accounted-for differential could not be funded, abolished all differentials in the State¹³. Appellant, I am sure, would concede that there is no requirement that the rest of the State maximum be raised to that in Chittenden County.

Finally, appellant argued that the lower court rationale should be rejected for two reasons. Her first argument that the State has unlimited resources is totally without foundation or logic. The Welfare Department's resources are clearly limited to the legislative appropriation. Appellant's second argument is that Chittenden County residents' shelter grant should be increased at the expense of shelter grants of recipients throughout the

¹³If this were done, Vermont would not save any money, because all savings must be applied across-the-board to all recipients of a maxima. It would then stand to follow that appellants, recipients of the "higher maximum" would be reduced to the "new average single-state-wide maximum." This alternative would be wholly consistent with Rosado v. Wyman, 397 U.S. , at 419, where the Court said, "Providing all factors in the old equation are accounted for and fairly priced and providing the consolidation on a statistical basis reflects a fair averaging ..."

rest of the State. Where does appellant find the rationale for increasing the Chittenden County recipient population's shelter grant, while lowering the rest of the State. Wouldn't it be more equitable and to conform with the Congressional intent of a uniform standard to adjust all maxima to that of one state-wide standard.

Appellant asserts in closing that the lower court erred in not finding that a differential was not fully reflecting actual cost, violated 42 U.S.C. §602(a)(23). There is nothing in the record to support appellant's contention that Vermont "has wholly eliminated the differential." Appellant's brief, at 31.

B. The shelter exceptions were an insignificant part of the total ANFC Program, and their elimination was not in violation of Section 402(a)(23) of the Social Security Act, 42 U.S.C. §602(a)(23).

1. Vermont has followed the mandate of 402(a)(23) and its position is distinguishable from New York in Rosado v. Wyman.

In analyzing Judge Oakes' decision of October 14, 1972, Judge Coffrin initially concluded that the paramount issue with respect to the elimination of the shelter exceptions was whether this elimination was significant in terms of Rosado v. Wyman, supra. However, before probing the rationale behind the Rosado decision in terms of the instant case, a look at §402(a)(23) is appropriate:

[The States shall] provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

Prior to the enactment of §402(a)(23), the States had complete discretion in determining the content of the standard of need. However, §402(a)(23) changed things, although "States still remained free to reorganize and rename the items and to provide funds for them through different methods ..." Alvarado v. Schmidt, 369 F. Supp. 447 (W.C. Wis. 1974)

As appellant currently points out, §402(a)(23) required the State to do two things to its standard of need. First, the standard must be adjusted to reflect fully changes in living costs; and second, any maximums must be proportionately adjusted.

In determining what 402(a)(23) meant to New York's program, the Supreme Court in Rosado importantly reviewed the makeup of what basic factors comprise an ANFC grant. First, the Court pointed out that King v. Smith, 392 U.S. 309 (1968) held that after the standard of need had been set, the states would traditionally determine the level of benefit. However, when it came time to search for the legislative history of 402(a)(23) the Court met with little success. It did find two broad purposes of the statute.

Initially it required states to "face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need; and secondly, to prod the States to apportion their payments on an equitable basis."

Rosado v. Wyman, supra at 412-413. (emphasis supplied)
Primarily due to New York's enormous reduction in overall benefit payments under its revised plan, the Court held that New York was in violation of 402(a)(23).

As will be shown infra, unlike New York, Vermont has not reduced the content of its standard, nor has it reduced its welfare expenditures in the ANFC program. To the contrary, Vermont has increased its expenditures in the ANFC program so that the benefit will be more equitably spread, by averaging the shelter exceptions throughout the entire caseload. (For statistical effect of this process, see Appendix to Exhibits at A-37)

In New York "No attempt was made to average special grants across the State and then add that figure to the basic recurring grant." Rosado, at 416.

2. The elimination of the shelter exceptions did not substantially alter the State's standard of need.

The heart of the dispute is whether the elimination of shelter exceptions caused a significant difference in the standard of need.

Rosado, at 419, sets forth some guidance in this area:

Section 402(a)(23) invalidates any state program that substantially alters the content of the standard of need in such a way that it is less than it was prior to the enactment of §402(a)(23), unless a state can demonstrate that the items formerly included no longer constitute part of the reality of existence for the majority of welfare recipients. (emphasis supplied)

In reaching the ultimate question of significance, the Court below adopted the position that "dollars spent, dollars saved and the amount received per recipient do not appear to have paramount importance in determining significance. Rather, the Court in Rosado appears to have looked to the magnitude of the impact on the ANFC populace itself." Opinion, Coffrin, J., Appendix at A-66. During both proceedings below, Vermont's position was that the shelter exceptions were an insignificant part of the ANFC program. In currently maintaining this position, we believe that, contrary to the Court's view, all aspects of fiscal impact should be looked at in reaching the ultimate question. We agree fully with the opinion of Judge Coffrin that the magnitude of the impact of the ANFC populace itself should be studied, but would also suggest that in order to make that study valid, other items in the picture should be considered. However, the Court below narrowly limited the comparison between the "number of cases receiving shelter exceptions and the entire ANFC caseload." Namely, of the

3,763 ANFC cases on the rolls as of October 1, 1970, 159 or 4.2% were receiving shelter exceptions. This was found to be insignificant, and we concur. But, Vermont feels this Court should go further and make another comparison of overall monetary consideration in view of the holding in Rosado¹⁴. This comparison will strengthen Judge Coffrin's conclusions. The Court failed to incorporate in its findings any information pertaining to the fiscal impact of Vermont's program changes that occurred on November 1, 1970.¹⁵

3. The Shelter exceptions were never part of the Shelter Maxima.

The granting of exceptions to the shelter maxima was a device to meet the rental needs of those individual recipients whose shelter costs were in excess of the applicable maximum shelter grant.

The Court below found that the shelter exceptions were not part of the shelter maxima, but part of the basic need standard and "averaged throughout the total ANFC

¹⁴The Court found that the effect of the New York program changes reduced their overall welfare expenditure by \$40,000,000

¹⁵At the conclusion of the trial, Judge Coffrin requested counsel to submit a Joint Proposal for findings of fact. Defendant's Request # 21, set forth n.p. 7 supra was not included. Defendant believes this request should have been considered in the Court's evaluation of the overall impact of defendant's revised program.

population and were totally eliminated as identifiable items in the basic need standard." Opinion, Coffrin, J., Appendix at A-65. Vermont has maintained this position since the inception of the litigation. Through its Director and Associate Director of the ANFC program, Vermont clearly showed below¹⁶ that the shelter exceptions were never part of the shelter maximum. This is demonstrated and supported by looking to two situations in which the exception might or might not have been used.

First, it was very clear that the exceptions were never used to determine initial eligibility¹⁷. If the exceptions were part of the shelter maxima then it would have to be used for eligibility purposes. The second basic fact which shows that the exceptions were never part of the maxima was that such exceptions were not granted in every case¹⁸.

¹⁶ See Affidavits of V. Bellini, Appendix at A-29 and B. N. Smith at A-28; and Testimony of V. Bellini, Transcript at 31, and Testimony of B. N. Smith, Transcript at 169.

¹⁷ See Testimony of V. Bellini, Transcript at 52, where Mr. Bellini gave the following illustration to show that the exception could not be used for initial eligibility. If a family had a need standard of \$200, and the maximum rent was \$104, the basic budget allowance would be \$304. If this family paid \$115 rent, and had an income of \$310, then for eligibility purposes the \$304 would be used and there would be no grant. Also, see Testimony of B. N. Smith, Transcript, at 185-186.

¹⁸ It was estimated by V. Bellini a majority of those who applied for exception were granted. See Transcript at 18. Also, see Testimony of B. N. Smith, Transcript at 189.

Admitted, the shelter exceptions were part of an unwritten policy. But where is appellant's logic when she says that since they were unwritten they became part of the maxima. Maybe, however, she is right in saying that they are payments in excess of need. See Appellant's brief at 19. If this be the case, the only violation would be that Federal matching funds were incorrectly made available. 45 C.F.R. §233.20(a)(3)(viii).

Appellant's final point is that under 402(a)(23), the State is prohibited from cutting dollar maxima. To this, we concur. However, the State did not cut any maximum. It merely eliminated the shelter exception as part of the need standard, and then, in compliance with Rosado, spread the cost throughout the caseload.

4. The shelter exceptions were de minimus so as to be outside the operative scope of 402(a)(23).

The lower court found the 4.2% of the total caseload was de minimus.

The court below, in part, relied on Johnson v. White, 353 F. Supp. 69 (D.Conn 1972), for a guide as to what de minimus is. In Johnson, a case somewhat similar to the instant case, welfare recipients claimed that the State's conversion to a "flat grant" system, by averaging the budgeted need with the special needs throughout the caseload was in

conflict with 402(a)(23). The Court held there was no violation because it regarded 2% of the recipient population¹⁹ to be de minimus.

Also, the case of Alvarado v. Schmidt, supra, can be distinguished at this point. In Alvarado, the Court found that the content was reduced from 140% to 120% of national average; certainly, a significant decrease in the maximum payment, without a corresponding pricing in the basic need standard.

5. Recent decisions interpreting Rosado support defendant's position

In Utah Welfare Rights Organization v. Lindsay, 315 F. Supp. 294 (D.Utah 1970), a case relied upon by appellant, the State was using a dollar maximum prior to 1969. The Court found it failed to consider the cost of living in increasing the maximum under §402(a)(23). The State was given an opportunity to submit a revised plan. The holding in Utah Welfare Rights Organization is totally inapplicable to the instant case. There, a maximum was not enlarged to reflect the increase in cost of living. There is no allegation by plaintiff that Vermont failed to take into consideration the cost of living.

¹⁹It was found that 2% of the group surveyed had actual higher rental needs than budgeted need. Further, if the sum in excess of standard were distributed over the families surveyed, each rent unit allowance would increase 21 cents.

Another recent case which interprets Rosado is New Jersey Welfare Rights Organization v. Cahill, 349 F. Supp. 501 (D.N.J. 1972 aff'd. 483 F. 2d 723 (1973)). That action challenged New Jersey's revamping of the ANFC program. Plaintiff claimed that the content of the standard was being reduced because the program was changing from one of an individual need basis to a flat grant system. What New Jersey did was very similar to Vermont's action. It averaged special needs throughout the entire recipient population. The question was whether that was a "fair averaging" in terms of Rosado. The appellate court held that was what New Jersey did in computing the average need of welfare recipients by random sample - decreasing assistance to some while increasing assistance to others - left nothing and was priced correctly. 483 F. 2d, at 726.

Finally, Rosado was sent back to the U. S. District Court and after a decision of that Court, this Court once again considered whether New York "created a new program which did not return to the system of special grants for special needs in effect prior to the illegal cutback of July 1, 1969." Rosado v. Wyman, 437 F. 2d 619 (1970). This Court, at 627, found that New York once again "failed to consolidate on a statistical basis as the Supreme Court had suggested by fair averaging." To the contrary, Vermont has taken the special needs and on a statistical basis as evidenced above "fair averaged" them into the basic standard of need.

Appellant cites Rhode Island Fair Welfare Rights Organization v. Department of Social and Rehabilitative Services, 329 F. Supp. 860 (D.R.I. 1971) for the proposition that elimination of special needs items means a per se violation of §402(a)(23) and Rosado. We disagree. In Rhode Island Fair Welfare Organization, the elimination of special needs caused a "substantial reduction in the content of the standard of need" at 867. These needs were harder to obtain under a new emergency program, and these items were not costed. Again, this is not the case in Vermont. The items eliminated were put back in the standard of need after being fairly priced.

- C. The elimination of the Fire Insurance Special Need item was insignificant and did not violate §402(a)(23)
1. The Court below was incorrect in saying that the fire insurance special need item was deleted inappropriately from the basic need standard.

Fire insurance as a special need was deleted from the ANFC budget of all recipients whose shelter grant was at the maximum²⁰. The lower Court found that due to the defendant's rounding process, to be discussed infra, the

²⁰ If an individual's shelter grant was below the maxima, fire insurance after November 1, 1970 has been included in the shelter grant, so long as the total shelter payment does not exceed the maximum.

16 cents per recipient allocated to fire insurance "was in effect averaged out of the standard of need." Opinion, Coffrin, J., Appendix, at 69.

In October, 1970, the month preceding the elimination of the special fire insurance need, 388 cases (out of a total of 3763 cases) were receiving this special need. See, id., Appendix at 64. The lower Court also found that as of August, 1971, when all the special needs were eliminated, a total of \$2.18 per recipient was taken from the basic need standard, and after rounding this amount, \$2.00 was put back in to each grant. See, id., at 64-65.

Finally, Judge Coffrin found that 16 of the 18 cents rounded off was made up of fire insurance, and the elimination of fire insurance did not increase the basic standard, and was not fairly priced into it in terms of Rosado. See, id., at A-65.

2. Fire Insurance was a small part of the overall Special Needs deletion program.

On October 16, 1970, the appellee issued a "Social Welfare Bulletin" detailing the effect of the then new 11/1/70 Regulation eliminating special needs:

Past policy has been to provide all ANFC recipients an 89.5% of basic needs payment standard in relation to the 100% of basic need eligibility standard while concurrently providing payment for special needs and exceptions above certain standards for only a portion of the caseload.

Vermont Statutes Annotated 33, 2554 state, "Should the funds available for public assistance be insufficient to provide public assistance to all those eligible, the amounts for public assistance granted shall be reduced uniformly and equitably to all recipients in the state." (underscoring supplied). To provide greater uniformity and equitability in the act of reduction to remain within budgeted funds, effective November 1, 1970 certain ANFC special need items will be funded at 100% ratable reduction and exceptions previously granted will be rescinded pending further notice. Concurrently, effective November 1, 1970, the ANFC basic need eligibility standard will be funded at 100%.

Effective November 1, 1970, the following ANFC special need items will be considered in determining eligibility but reduced 100% and the following items which have been authorized heretofore, in certain cases, as exceptions will be rescinded:

<u>Special Needs</u>	<u>Exceptions</u>
1. School allowances	1. Shelter
2. Telephone	2. Home repairs
3. Life insurance premiums	3. Appliances and equipment

See Appendix to Exhibits at A-3 - A-17.

In essence all special needs were ratably reduced 100% (to zero) and the basic need standard was increased from 89.5% payment to 100%. ²¹ There were many special

²¹At trial, Edward Pirie testified to the fiscal significance of this action. Although Judge Coffrin did not find this information very relevant, appellee asserts that the Court erred in not considering the overall cost impact to the State. See transcript at 125-132. A summary of this testimony showing the net monetary cost to the State of the update of \$60,413, or \$4.42 per recipient can be found at Appendix to Exhibits at A-35. This same significant impact is the type of overall impact that was considered in Rosado.

need items eliminated from the standard. Some of these included expenses for telephone, life insurance, diabetic diets, education loans, etc.²² The total cost for all special needs excluding fire insurance amounted to \$2.02 (\$2.18 - .16) per recipient family. Thus, all special needs, except for fire insurance amounted to 93% of the total special needs that were eliminated. Or, conversely, fire insurance was 7% of the total needs eliminated.

3. The deletion of Fire Insurance as a Special Need was permissible because it was included in the overall increase in the ANFC payment level.

As Judge Oakes concluded, "Under Rosado, it is permissible for states to consolidate items on the basis of statistical averages, even though 'such averaging may affect some families adversely and benefit others,' and even though 'net payout, assuming no change in level of benefits, may be somewhat less under a streamlined program.' 397 U.S. at 419."

Appellee continues to maintain this is all that happened. As a matter of fact, Vermont increased its level of payment and budgetary costs. See New Jersey Welfare Rights Organization v. Cahill, supra.

²²See Testimony of Edward Pirie, Transcript at 130.

Judge Coffrin's analysis of the rounding off process is both difficult to follow and wholly inconsistent. On one hand, he held that because of the rounding off process only the fire insurance special need was eliminated and this was done in violation of §402(a)(23); while on the other hand, the Court "does not pass on the propriety" of that process. Appellee asserts that it is more reasonable to say that fire insurance was only 7% of the totally eliminated special needs, and while it is de minimus, nevertheless was incorporated in the overall increased need standard.

The lower Court confused matters further when it seized upon that fact that fire insurance was not eliminated as a special need, because only the payment was ratably reduced by 100% to zero. This categorization is simply erroneous. There was no question that the fire insurance was a special need, and was treated in the same fashion as all other special needs, namely eliminated.

The lower Court is correct where it asserts that "it was removed from its prior status as an independent need item and placed within the maxima applicable to the shelter component of the basic need standard." See Opinion, Coffrin, J., Appendix at A-71.

However, that took place after November 1, 1970, and is not relevant to it being eliminated as a special

need prior to November 1, 1970, the latter practice being entirely permissible. See Rosado v. Wyman, 437 F. 2d 619.

Finally, the Court incorrectly places the fire insurance special needs within the second component of §402(a)(23). The special need did not relate to a maximum. Fire insurance was paid on an as-needed basis, without a regulatory maximum. Therefore, the Court is incorrect in its conclusions, at least by implication that the appellee abolished a maximum. What the lower court has done is to improperly qualitatively evaluate the fire insurance component. See Rosselli v. Affeck, 373 F. Supp. 36, 43 (1974). Rosselli is interesting because that Court went one step beyond the New Jersey Welfare Rights Organization v. Cahill, supra, analysis and looked to see whether the "averaging process or the inclusion of a certain component in the process did not create a broad distortion in the standard of need." (emphasis supplied) at 44. If we adopt this standard, it is clear there is no broad distortion in Vermont's elimination of the fire insurance need. The \$2.18 elimination would have become \$2.00 irrespective of the value placed on the fire insurance. There was simply a proportionate adjustment reflected in the rounding process.

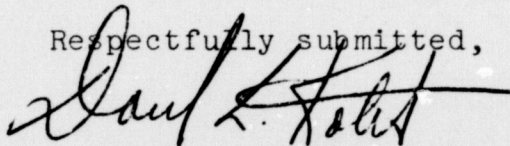
CONCLUSION

For the reasons stated above, appellee urges this Court to affirm the lower Court's Order of October 14, 1972, granting defendant's Motion for Summary Judgment.

In addition, this Court is urged to affirm the lower Court's order of May 9, 1974, granting judgment for defendant.

Finally, appellee urges that this Court reverse the lower Court's order of July 19, 1974, and find that defendant did not violate §402(a)(23) of the Social Security Act when it eliminated the fire insurance special needs.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "David L. Kalib", written over the typed name.

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March 17, 1975